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Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

SWAMI INC.
Petitioner,

v.

ROBERT LEE in his capacity as Allen County Treasurer,
THERESE BROWN in her capacity as Allen County Auditor,
and THELMA RETZ
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I

.Did the Indiana Court of Appeals violate Swami's procedural due process rights by sidestepping constitutional review of Indiana's tax sale procedure under the *Jones* case by improperly finding and relying upon implied waiver.

II

In terms of the merits of Swami's procedural due process claim based upon constitutionally insufficient notice, does Indiana's Tax Sale procedure applied to Swami pass constitutional muster as set forth by this Court in the case of *Jones v. Flowers*.

PARTIES TO THE PROCEEDINGS

Petitioner is Swami Inc., an Indiana Corporation which was a Defendant in the Trial Court in a proceeding filed in the Allen County, Indiana Circuit Court concerning the sale of certain real estate for the payment of unpaid property taxes. Respondents are Robert Lee in his capacity as Allen County Treasurer and Therese Brown in her capacity as Allen County Auditor who were Plaintiffs in the Trial Court. Respondent Thelma Retz was an intervener in the Trial Court. The Respondents were all Appellants in the Indiana Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Swami Inc. is a closely held Indiana Corporation with no parent corporation and no publicly held company owns ten percent (10%) or more of Swami Inc. stock.

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IN THE
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SWAMI INC.
Petitioner,

v.

ROBERT LEE in his capacity as Allen County Treasurer, THERESE BROWN in her capacity as Allen County Auditor, and THELMA RETZ
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner Swami Inc. (hereinafter "Swami"), by counsel Robert R. Faulkner, respectfully petitions for a writ of certiorari to review the judgment of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The January 25, 2008 opinion of the Indiana Court of Appeals is not reported. It is reproduced in Appendix A at App. p. 2. The April 1, 2008 Memorandum Decision on Rehearing was not published. It is reproduced in Appendix E at App. p. 30. The Order of the Indiana Supreme Court Denying Transfer is reproduced in Appendix F at

App. p. 36. The Opinions/Orders of the Trial Court Granting Petitioner's Motion to Set Aside Tax Deed are reproduced in Appendices B, C and D at App. p. 21, p. 23 and p. 27 respectively. It is from the Opinions/Orders of the Trial Court that the Respondents appealed which were reversed by the Indiana Court of Appeals.

JURISDICTION

The Indiana Court of Appeals entered its opinion on January 25, 2008. Petitioner then timely filed a Petition for Rehearing on February 21, 2008 which was denied on April 1, 2008. Petitioner then filed a timely Petition to Transfer to the Indiana Supreme Court on May 1, 2008 which was denied on July 10, 2008. Petitioner has filed this Petition within ninety (90) days as required by Supreme Court Rule 13(1). Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1257.

The constitutional issues discussed herein were raised by Swami in its Motion for Relief from Judgment filed in the Trial Court on or about August 25, 2006 and its Memorandum in Support thereof also filed that date. The Trial Court ruled in favor of Swami on those issues (Appendices B, C and D hereto). The constitutional issues discussed herein were further raised by Swami at the appellate stage in its Brief of Appellee, Petition for Rehearing and Petition to Transfer to the Indiana Supreme Court. Neither the Indiana Court of Appeals nor the Indiana

Supreme Court addressed the merits of the constitutional issues raised by Swami and decided by the Trial Court, (Appendix A, E and F hereto).

The provisions of 28 USC § 2403 (b) Pursuant to Rule 29.4 (c) of the rules of the United States Supreme Court, the Attorney General of the State of Indiana is being served with three (3) copies of this Petition and Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5 to the constitution of the United States states as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Amendment 14 to the Constitution of the United States states as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The primary Indiana Statute at issue herein is I.C. 6-1.1-25-4.6 as follows:

Petition to court for issuance of tax deed; court orders; refunds; effects of tax deed; appeal

Sec. 4.6. (a) After the expiration of the redemption period specified in section 4 of this chapter but not later than six (6) months after the expiration of the period of redemption:

(1) the purchaser, the purchaser's assignee, the county executive, or the purchaser of the certificate of sale under IC 6-1.1-24 may; or

(2) in a county where the county auditor and county treasurer have an agreement under section 4.7 of this chapter, the county auditor shall, upon the request of the purchaser or the purchaser's assignee; file a verified petition in the same court and under the same cause number in which the judgment of sale was entered asking the court to direct the county auditor to issue a tax deed if the real property is not redeemed from the sale. Notice of the filing of this

petition shall be given to the same parties and in the same manner as provided in section 4.5 of this chapter, except that, if notice is given by publication, only one (1) publication is required. The notice required by this section is considered sufficient if the notice is sent to the address required by section 4.5(d) of this chapter. Any person owning or having an interest in the tract or real property may file a written objection to the petition with the court not later than thirty (30) days after the date the petition was filed. If a written objection is timely filed, the court shall conduct a hearing on the objection.

(b) Not later than sixty-one (61) days after the petition is filed under subsection (a), the court shall enter an order directing the county auditor (on the production of the certificate of sale and a copy of the order) to issue to the petitioner a tax deed if the court finds that the following conditions exist:

(1) The time of redemption has expired.

(2) The tract or real property has not been redeemed from the sale before the expiration of the period of redemption specified in section 4 of this chapter.

(3) Except with respect to a petition for the issuance of a tax deed under a sale of the certificate of sale on the property under IC 6-1.1-24-6.1, all taxes and special assessments, penalties, and costs have been paid.

(4) The notices required by this section and section 4.5 of this chapter have been given.

(5) The petitioner has complied with all the provisions of law entitling the petitioner to a deed.

The county auditor shall execute deeds issued under this subsection in the name of the state under the county auditor's name. If a certificate of sale is lost before the execution of a deed, the county auditor shall issue a replacement certificate if the county auditor is satisfied that the original certificate existed.

(c) Upon application by the grantee of a valid tax deed in the same court and under the same cause number in which the judgment of sale was entered, the court shall enter an order to place the grantee of a valid tax deed in possession of the real estate. The court may enter any orders and grant any relief that is necessary or desirable to place or maintain the grantee of a valid tax deed in possession of the real estate.

(d) Except as provided in subsections (e) and (f), if:

(1) the verified petition referred to in subsection (a) is timely filed; and

(2) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the petitioner under subsection (a) to fulfill the notice requirement of subsection (a);

the court shall order the return of the amount, if any, by which the purchase price exceeds the minimum bid on the property under IC 6-1.1-24-5(e) minus a penalty of twenty-five percent (25%) of that excess. The petitioner is prohibited from participating in any manner in the next succeeding tax sale in the county under IC 6-1.1-24. The county auditor shall deposit

penalties paid under this subsection in the county general fund.

(e) Notwithstanding subsection (d), in all cases in which:

(1) the verified petition referred to in subsection (a) is timely filed;

(2) the petitioner under subsection (a) has made a bona fide attempt to comply with the statutory requirements under subsection (b) for the issuance of the tax deed but has failed to comply with these requirements;

(3) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the
failure to comply with these requirements; and

(4) the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24 files a claim with the county auditor for refund not later than thirty (30) days after the entry of the order of the court refusing to direct the county auditor to execute and deliver the tax deed; the county auditor shall not execute the deed but shall refund the purchase money minus a penalty of twenty-five percent (25%) of the purchase money from the county treasury to the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24. The county auditor shall deposit penalties paid under this subsection in the county general fund. All the delinquent taxes and special assessments shall then be reinstated and recharged to the tax duplicate and collected in the same manner as if the property had

not been offered for sale. The tract or item of real property, if it is then eligible for sale under IC 6-1.1-24, shall be placed on the delinquent list as an initial offering under IC 6-1.1-24.

(f) Notwithstanding subsections (d) and (e), the court shall not order the return of the purchase price or any part of the purchase price if:

(1) the purchaser or the purchaser of the certificate of sale under IC 6-1.1-24 has failed to provide notice or has provided insufficient notice as required by section 4.5 of this chapter; and

(2) the sale is otherwise valid.

(g) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances created or suffered before or after the tax sale except those liens granted priority under federal law, and the lien of the state or a political subdivision for taxes and special assessments that accrue subsequent to the sale. However, the estate is subject to all easements, covenants, declarations, and other deed restrictions and laws governing land use, including all zoning restrictions and liens and encumbrances created or suffered by the purchaser at the tax sale. The deed is prima facie evidence of:

(1) the regularity of the sale of the real property described in the deed;

(2) the regularity of all proper proceedings; and

(3) valid title in fee simple in the grantee of the deed.

(h) A tax deed issued under this section is incontestable except by appeal from the order of the

court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court's order

Indiana Code Section 6-1.1-25-16 provides:

A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if:
(1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
(2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
(3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
(4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
(5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
(6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
(7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections.

STATEMENT OF THE CASE

A. Facts

Petitioner seeks review of the ruling of the Indiana Court of Appeals holding that Swami had waived its right to challenge any due process deficiencies of notice in issuance of a tax deed for its property by failing to raise that issue at a time when Indiana judicial precedent was such that such a challenge would have been futile if not frivolous.

In the Trial Court the parties submitted a list of stipulated facts to the trial court, in lieu of an evidentiary hearing, addressing whether the Auditor provided Swami with Constitutionally adequate notice of the tax sale of its property under the United State Supreme Court's decision in *Jones v. Flowers*. The complete list of the facts stipulated to by the parties and adopted by the Trial Court is as follows:

Plaintiffs, by counsel, Defendant Swami, Inc. ("Swami"), by counsel, and Intervenor Thelma Retz, by counsel, stipulate and agree to the following facts regarding the Court's determination on Swami's Trial Rule 60(B) Motion:

1. In May of 1999, Swami, Inc. ("Swami") was formed for the purpose of investing in real estate.

2. At all relevant times, Swami's principal place of business was the same as the residence of Subhash Reddy ("Subhash"), Swami's President.

3. At all relevant times, Swami's investors included three physicians and a realtor.

4. In June of 1999, Swami purchased sixty-three (63) acres of real estate comprised of a forty (40) acre parcel and an abutting twenty-three (23) acre parcel. The forty acre parcel is located at 9019 Illinois Road, Fort Wayne, Allen County, Indiana. The twenty-three acre parcel is located at 9100 Illinois Road, Fort Wayne, Allen County, Indiana.

5. At all relevant times, the Allen County Auditor's Office (the "Auditor's Office") used a Key Number System to identify parcels of real property.

6. At all relevant times, the twenty-three acre parcel of real estate was carried by the Auditor's Office as Key Number 11-0011-0010 (the "Real Estate").

7. The Real Estate is an approximately twenty-three acre parcel of unimproved real property and is taxed separately as such.

8. As a matter of procedure, on or before July 1 of any given tax year, the Allen County Treasurer certifies a delinquency list, created by the Auditor's Office, of any and all real estate to be placed in a fall tax sale.

9. Real estate may be certified for tax sale only after the real property taxes and/or special assessments on a parcel of real estate are delinquent from the previous year's spring tax installment.

10. As of July 1, 2002, the real property taxes for the Real Estate were delinquent from the previous year's spring installment.

11. As of July 1, 2002, no taxes had been paid on the Real Estate since May 10, 2000.

12. On or around July 1, 2002, the Real Estate was certified for placement in the 2002 Allen County Tax Sale.

13. For each property that is certified for placement in a tax sale, the Auditor's Office prepares a written notice of the tax sale ("Notice of Tax Sale") and sends the Notice of Tax Sale by certified mail to the property owner of record at the owner's last known address of record as indicated by the records of the Auditor's Office.

14. Since June of 1999, the owner for the Real Estate as indicated by the records of the Auditor's Office was Swami.

15. When the Auditor's Office prepared and sent the Notice of Tax Sale for the Real Estate, Swami's address as indicated by the records of the Auditor's Office was 1311 Dell Cove Dr., Fort Wayne, Indiana 46804 (the "Dell Cove address").

16. On or about July 23, 2002, the Auditor's Office sent the Notice of Tax Sale to Swami by certified mail to the Dell Cove address.

17. At one time, Subhash lived at the Dell Cove address. However, Subhash and his wife moved from the Dell Cove address in 1999.

18. The Reddys changed residences (and therefore Swami's principal place of business) four times during the three-and-a-half period following Swami's purchase of the Real Estate.

19. A property owner who wishes to change his or her address of record at the Auditor's Office, other than by deed, must complete a form Change of Address Affidavit or provide a letter with the taxpayer's new information. To effect the address change, both the form Change of Address Affidavit and the letter must be notarized when given to the Auditor's Office.

21. On or about November 15, 1999, five months after Swami's purchase of the Real Estate, Subhash submitted a Change of Address Affidavit to the Auditor's Office for five properties that he personally owned.

22. At no time relevant did Swami file a notarized Change of Address Affidavit or notarized letter seeking a change of address for Swami with the Auditor's Office.

23. At all relevant times, a United States Postal Service customer who wished to have his or her mail forwarded was required to file a change of address form with the post office. After the change of address form was filed, the USPS would forward mail - including certified mail -- for a period of one year. After the one-year forwarding period expired, the USPS would not deliver mail - including certified mail - to the former address, nor would it forward such mail to the new address.

24. The Notice of Tax Sale sent to Swami at the Dell Cove address was returned to the Auditor's Office marked "Returned to Sender - Undeliverable as Addressed - Unable to Forward."

25. When the certified mailing of the Notice of Tax Sale addressed to Swami at the Dell Cove address was returned, the Auditor's Office searched its records and the local phone book, but found no other address for Swami.

26. At all relevant times, Swami was not listed in any phone book. However, Subhash Reddy was listed as Swami's registered agent for service of process in Swami's Articles of Incorporation filed with the Indiana Secretary of State. The address listed for Subhash on the Articles of Incorporation filed with the Indiana Secretary of State is the Dell Cove address.

27. In searching its own records, the Auditor's Office did discover, through a name search, that Swami owned an adjacent real estate parcel, located at the physical address of 9019 Illinois Road, Fort Wayne, Indiana 46804 (the "Illinois Road address").

28. According to the records of the Auditor's Office, the Illinois Road address contained an improvement to the real estate.

29. On August 21, 2002, in a further attempt to notify Swami of the tax sale, the Auditor's Office sent, by certified mail, a second Notice of Tax Sale to Swami at the Illinois Road address.

30. Unbeknownst to the Auditor's Office, the improvement on the Illinois Road address was an unused and dilapidated barn. Moreover, there was no mailbox at the address, so there was no place to deliver mail there. However, the Auditor's Office

was not aware, at any relevant time, that there was no mailbox at the Illinois Road address.

31. At all relevant times, there was no structure of any kind on the Real Estate, nor was there any mailbox.

32. The certified mailing of the Notice of Tax Sale addressed to Swami at the Illinois Road address was returned marked "'Returned to Sender - No Such Number."

33. Prior to the 2002 fall tax sale, the Auditor's Office posted additional notice of the tax sale at a public place of posting in the county courthouse or in another public county building at least twenty-one (21) days before the earliest date of application for judgment. The Auditor's Office further published notice of the tax sale once each week for three (3) consecutive weeks in the Fort Wayne Journal Gazette and the Fort Wayne News Sentinel newspapers.

34. Following the return of the Tax Sale Notice, the Auditor's Office did not attempt the following:

a. To search the records of any other Allen County department for alternative addresses for Swami;

b. To search the Indiana Secretary of State's records for the registered agent for Swami or an alternative address for Swami;

c. To send notice to the Dell Cove address, the Real Estate or the Illinois Road address by regular first class mail;

d. To re-send notice addressed to "occupant" or "property owner" to the Dell Cove address;

e. To send notice addressed to "occupant" or "property owner" to the Real Estate;

f. To send notice addressed to "occupant" or property owner" to the Illinois Road address;

g. To visit the Real Estate; or

h. To post notice on the Real Estate.

35. At all relevant times, the records at the Auditor's Office reflected Subhash and Jyothirmai Reddy as the owners of the Dell Cove address. The Auditor's Office is not sure whether a search of its records was performed for the owner of the Dell Cove address.

36. On or about August 22, 2002, Jyothirmai Reddy, the wife of Subhash, received a notice of tax sale for the Reddys' personal residence located at 10609 Callendar Court, Fort Wayne, Indiana.

37. In response to the notice, Jyothirmai and two friends went to the Allen County Treasurer's Office to attempt to prevent the tax sale of the Reddys' residence.

38. While at the Treasurer's Office, Jyothirmai discovered there were taxes due and owing on other properties owned by the Reddys.

39. On August 22, 2002, Jyothirmai obtained and tendered a certified check in the amount of $9,166.34 for the taxes owed on properties owned by the Reddys that were scheduled for tax sale. That same day, Jyothirmai obtained and tendered a certified check in the amount of $14,616.77 for taxes owed on other properties owned by the Reddys that were not scheduled for tax sale.

40. The 2002 Allen County Fall Tax Sale took place on September 18, 2002.

41. At the public tax sale, the Real Estate was sold to Thelma Retz ("Retz").

42. Retz was issued a Certificate of Sale for the Real Estate by the Auditor's Office.

43. On or about September 19, 2002, Retz brought current all of the delinquent taxes and unpaid fees for the Real Estate.

44. As the highest bidder at tax sale, Retz paid Eighteen Thousand Dollars ($18,000.00) for the Real Estate. An appraisal of the Real Estate valued the property at more than Five Hundred Thousand Dollars ($500,000.00).

45. The amount paid by Retz for the Real Estate was in excess of the amount owed for the delinquent taxes and fees, creating a surplus of Sixteen Thousand Nine Hundred and Twenty-Eight Dollars and Twenty Cents ($16,928.20), from which the Auditor's Office paid One Thousand Six Hundred and Sixty-Six Dollars and Fifty-Four Cents ($1,666.54) to satisfy delinquent real property taxes for the Illinois Road property also owned by Swami. The remaining surplus amount ($15,261.66) ("the Surplus") was held in an account by the Allen County Treasurer's Office.

46. On December 10, 2003, the Surplus was claimed and paid out in its entirety to National Cash Refund, Inc., the agent retained by Swami to collect the Surplus fund.

47. A true and accurate copy of the Accounts Payable Voucher releasing a check for the Surplus fund in the amount of $15,261.66 (the "Surplus Fund Check") under Warrant Number 318498 was attached as "Exhibit F to the stipulation

48. According to the records contained in the Auditor's Office, the Surplus Fund Check dispersed to Swami's agent, National Cash Refund, Inc., was cashed on or about December 16, 2003

49. Once a property is sold at tax sale in Allen County, the owner or an interested party may "redeem" the property by paying to the county treasurer the amount required for redemption (including, but not limited to, the delinquent taxes and fees) at anytime during the one year period immediately following the date of the tax sale.

50. The Auditor's Office may petition for a tax deed after one (1) year has elapsed from the date of the tax sale.

51. Once a property is sold at tax sale in Allen County, the Auditor's Office hires a title company to perform a title search on the property to identify all persons with a substantial interest of public record therein.

52. After Retz purchased the Real Estate, a title search was performed thereon (the "title search").

53. The title search showed Mid Am Bank as the only person with a substantial property interest of public record for the Real Estate.

54. On May 28, 2003, during the redemption period, the Auditor's Office sent Notice to Owner and Interested Parties of Sale of Real Estate for Unpaid Real Estate Property Taxes: Fall 2002 Tax Sale (the "Notice of Sale of Real Estate") to Swami at the Dell Cove address.

55. The certified mailing of the Notice of Sale of Real Estate addressed to Swami at the Dell Cove address was returned to the Auditor's Office marked "Returned to Sender - Not Deliverable as Addressed - Unable to Forward."

56. On May 28, 2003, during the redemption period, the Auditor's Office also sent the Notice of Sale of Real Estate to Mid Am Bank, the mortgagee of record, to its last known address of 519 Madison Avenue, Toledo, Ohio 43 804 (the "Madison Avenue address").

57. On May 30, 2003, the certified mailing of the Notice of Sale of Real Estate addressed to MidAm Bank at the Madison Avenue address was delivered and signed for by Marie Douglas.

58. Following the return of the Notice of Sale of Real Estate sent to Swami, the Auditor's Office did not attempt the following:

a. To search the records of any other Allen County department for alternative addresses for Swami;

b. To search the Indiana Secretary of State's records for the registered agent for Swami or an alternative address for Swami;

c. To send notice to the Dell Cove address, the Real Estate or the Illinois Road address by regular first class mail;

d. To re-send notice addressed to "occupant" or "property owner" to the Dell Cove address;

e. To send notice addressed to "occupant" or "property owner" to the Real Estate;

f. To send notice addressed to "occupant" or "property owner" to the Illinois Road address;

g. To visit the Real Estate; or

h. To post notice on the Real Estate.

59. The one-year redemption period for the Real Estate expired on September 18, 2003.

60. No one redeemed the Real Estate during the one-year redemption period.

61. When a real estate property is not redeemed within the one-year redemption period, the Auditor's Office may petition the court for a tax deed in the name of the purchaser of the tax delinquent property.

62. On October 7, 2003, after the redemption period for the Real Estate had expired, the Auditor's Office sent a "Notice of Petition for a Tax Deed - Fall 2002 Tax Sale" ("Notice of Petition for Tax Deed") to Swami at the Dell Cove address and to Mid Am Bank and the Madison Avenue address.

63. The certified mailing of the Notice of Petition for Tax Deed addressed to Swami at the Dell Cove address was returned to the Auditor's Office marked "Returned to Sender."

64. On October 9, 2003, the certified mailing of the Notice of Petition for Tax Deed addressed to MidAm Bank at the Madison Avenue address was delivered and signed for by Marie Douglas.

65. Following the return of the Notice of Petition for Tax Deed sent to Swami, the Auditor's Office did not attempt the following:

a. To search the records of any other Allen County department for alternative addresses for Swami;

b. To search the Indiana Secretary of State's records for the registered agent for Swami or an alternative address for Swami;

c. To send notice to the Dell Cove address, the Real Estate or the Illinois Road address by regular first class mail;

d. To re-send notice addressed to "occupant" or "property owner" to the Dell Cove address;

e. To send notice addressed to "occupant" or "property owner" to the Real Estate;

f. To send notice addressed to "occupant" or property owner" to the Illinois Road address;

g. To visit the Real Estate; or

h. To post notice on the Real Estate.

66. On or about October 8, 2003, the Auditor's Office filed a petition with the Allen County Circuit Court requesting authority to issue a tax deed for the Real Estate to Retz.

67. On or about November 14, 2003, the Court issued an Order finding that the requisite conditions had been satisfied for the issuance of a tax deed for the Real Estate.

69. On or about November 24, 2003, The Auditor's Office transferred and conveyed to Retz a Tax Title Deed (``Tax Deed") for the Real Estate. The Tax Deed was properly recorded in the Office of the Recorder of Allen County as Document #203120413.

B. Statement of Proceedings and Disposition in the Courts Below

This matter was commenced on August 28, 2002 as a proceeding for the Tax Sale of various parcels of real estate in Allen County, Indiana. One of the properties sold at Tax Sale by Allen County was the subject parcel owned by Petitioner. On or about October 8, 2003 the Allen County Auditor filed a Petition with the Trial Court for authority to issue a tax deed to the subject real estate to Respondent Retz. On or about November 14, 2003 the Allen Circuit Court issued an order granting Retz a Tax Deed for the real estate. After learning of the Tax Sale of the property and issuance of a Tax Deed on January 12, 2004 Swami filed a Verified Objection to Issuance of a Tax Deed. On August 5, 2005 the Trial Court overruled Swami's objection to issuance of a Tax Deed and Swami took an appeal to the Indiana Court of Appeals. On February 8, 2006 the Indiana Court of Appeals issued its opinion for publication reported at 841 N.E.2d 1173 (Ind.Ct.App. 2006)(Trans.Den.). The Indiana Court of Appeals there held that the only basis for a valid objection to issuance of a Tax Deed are those

specifically enumerated in I.C. 6-1.1-25-16 and that since Swami's objection did not specifically recite any of the enumerated objections there was no basis for setting aside the Tax Deed. The Court of Appeals further held that Swami was not entitled to relief based upon its reliance upon a misrepresentation of an employee in the County Treasurer's Office because Swami had failed to file a change of address form. The Indiana Court of Appeals further analyzed Swami's procedural and substantive due process arguments based solely upon Indiana Cases dealing strictly with substantive due process rights and held that the Indiana Tax Sale Statute was facially constitutional and constitutional as applied. On March 8, 2006 Swami filed a Petition to Transfer to the Indiana Supreme Court. On April 26, 2006 this Court decided the case of *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d. 415 (2006) in which it addressed the issue of constitutionally sufficient notice in tax sale cases such as this. On May 16, 2008 Swami filed a Motion to Remand the matter to the Trial Court in light of this Court's ruling in the *Jones* case. On July 6, 2006 the Indiana Supreme Court unanimously declined jurisdiction and failed to rule on Swami's Motion to Remand.

On August 25, 2006, Swami filed a Motion for Relief from Judgment under Indiana Trial Rule 60(B), which is the Indiana counterpart to Federal Rule of Civil Procedure 60(b). On December 7, 2006 the trial judge entered an order granting

Swami's Rule 60(B) motion "in part subject to Findings of Fact and Conclusions of Law filed by separate order." On December 13, 2006 the Trial Court issued its judgment upon Swami's Trial Rule 60(B) motion. On April 11, 2007 the parties filed their Stipulation Facts as to Swami's Trial Rule 60(B) motion and on May 15, 2007 the Trial Court set aside Retz's Tax Deed. Retz filed her Notice of Appeal on June 1, 2007. After briefing the Court of Appeals issued its Memorandum decision on January 25, 2008 holding that this Court's ruling in Jones had no effect on Indiana law, that all of Swami's arguments based upon *Jones* were available prior to this Court's ruling in *Jones* and therefore those arguments were all waived by virtue of having not been raised initially in attacking the validity of the Tax Deed. The Court further expanded upon that holding in its Memorandum Decision on Rehearing of April 1, 2008. On May 1, 2008 Swami filed its Petition to Transfer to the Indiana Supreme Court which was denied on July 10, 2008.

REASONS FOR GRANTING OF THE PETITION

A. The Indiana Court of Appeals Sidestepped Constitutional Review of Indiana Tax Sale Procedure Under the *Jones* Case by Improperly Finding Implied Waiver

At the time Swami's first appeal was decided it was very well settled in Indiana that a person

could only defeat a Tax Title Deed by proving one of the seven (7) defects enumerated in I.C. 6-1.1-25-16 which are as follows:

A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if:
(1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
(2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
(3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
(4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
(5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
(6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
(7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections. *Nieto v. Kezy*, 846 N.E.2d 327, 337-338 (Ind.Ct.App. 2006), *Whalen v. M. Doed, LLC*, 859 N.E.2d 368, 373 (Ind.Ct.App.

2006), *Swami Inc. v. Lee,* 841 N.E.2d 1173, 1176-1177 (Ind.Ct.App. 2006)(Trans.Den.), *Leininger v. Green,* 596 N.E.2d 955, 958 (Ind.Ct.App. 1992)(Trans.Den.).

The Indiana Court of Appeals noted that "§ 16 must be strictly applied", *Swami Inc,* 841 N.E.2d at 1177. Consequently, the rule at that time was that the notice required by the statute merely be in substantial compliance with the manner prescribed by the Tax Sale Statute, *Elizondo v. Read,* 588 N.E.2d 501, 504-505 (Ind. 1992), *Diversified Invesments LLC v. U.S. Bank NA,* 838 N.E.2d 536, 542 (Ind.Ct.App. 2005)(Trans.Den.), *Schaefer v. Kumar,* 804 N.E.2d 184, 191 (Ind.Ct.App. 2004)(Trans.Den.). Based upon these many authorities of Indiana Courts it is clear that any due process constitutional challenge available to Swami prior to the *Jones* case was illusory at best and could have been characterized as frivolous under Indiana precedent.

The Indiana Court of Appeals in brushing aside Swami's constitutional due process claims of insufficient notice held that this Court's ruling in *Jones* did not effect any substantial change in Indiana law, (App. A, pp. 18-19, n. 12). This proclamation by the Indiana Court of Appeals is contrary to the language of the *Jones* case itself wherein the opinion specifically cites Indiana Supreme Court authority which is contra to this Court's holding in *Jones*. *Jones v. Flowers,* 547

U.S. 220, 227, 126 S.Ct. 1708, 1715 164 L.Ed.2d. 415, 426 (2006)(citing *Elizondo v. Read*, 588 N.E.2d 501, 504 (Ind. 1992).

The Indiana Court of Appeals' conclusion that the *Jones* case did not change Indiana law is undermined by the holding of the first Swami appeal when considered in light of the *Jones* case. In the first, pre *Jones* case, the Indiana Court of Appeals held that, notwithstanding the fact that Swami had been misinformed by the County Auditor's office, since Swami had failed to file a change of address notice it had forfeited its right to constitutionally sufficient notice, had waived the right to object to lack of notice and to rely upon information provided by the Auditor's office, *Swami Inc. v. Lee,* 841 N.E.2d 1173, 1178-1179 (Ind.Ct.App. 2006) (Trans.Den.). This Court stated in this regard in *Jones*: "The Commissioner does not argue that Jones' failure to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree". *Jones*, 547 U.S. at 232, 126 S.Ct. at 1717, 164 L.Ed.2d at 429. This Court's statement constitutes a specific rejection of the operative holding of the first Swami appeal.

Notwithstanding the futility which would have met Swami having raised the issue of the due process violation effected by lack of notice prior to this Court's holding in *Jones*, the Indiana Court of Appeals side stepped analyzing operation of Indiana's tax sale statute in light of *Jones* by finding

a presumed waiver of Swami's constitutional due process right to notice. The law does not presume the waiver of constitutional rights, *Lake James Fire Department, Inc. v. Burke County N.C.* 149 F.3d 277, 280 (4th Cir. 1998), *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997). There is a presumption against waiver of due process rights, *Johnson v. U.S. Department of Agriculture,* 734 F.2d 74, 784 (11th Cir. 1984), *Monsanto v. Ruckelshaus,* 753 F.2d 649, 654 (8th Cir. 1985). An effective waiver of a constitutional right has been expressed as an "intentional relinquishment or abandonment of a known right or privilege", *Atorie Air v. F.A.A.*, 942 F.2d 954, 959 (5th Cir. 1991), *Domka v. Portage County* Wisconsin, 523 F.3d 776, 781-788 (7th Cir. 2008) In *re Midway Airlines, Inc.* 383 F.3d 663. 671 (7th Cir. 2004), *U.S. v. Mantas*, 274 F.3d 1127, 1130 (7th Cir. 2001), *In re RFE Industries, Inc* 283 F.3d 159 (3rd Cir. 2002). A waiver of a due process right must be voluntarily, intelligently and knowingly made with sufficient awareness of the relevant circumstances and likely consequences, *Martin v. Amoco Oil Co.*, 679 N.E.2d 139, 144-145 (Ind.Ct.App. 1997)(affirmed in relevant part, *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 386 (Ind. 1998)), *Nose v. Attorney General of U.S.*, 993 F.2d 75, 79 (5th Cir. 1993), *Lake James Fire Department, Inc.* 149 F.3d at 280, *Doe v. Pennsylvania Board of Probation and Parole*, 513 F.3d 95, 99 (3rd. Cir. 2008). In both criminal and civil cases due process rights may ordinarily be waived only if it is established by clear and convincing evidence that the

waiver is voluntary, knowing and intelligent, *Gete*, 121 F.3d at 1293. A claimed waiver of the constitutional right to due process is examined with the strictest of scrutiny, *Atorie Air v. F.A.A.*, 942 F.2d at 959. Courts indulge every reasonable presumption against waiver, *Id, Gete v. I.N.S.*, 121 F.3d at 1293, *Nose v. Attorney General of U.S.* 993 F.2d at 79. The record here contains no evidence that Swami voluntarily, knowingly or intelligently waived due process or other constitutional rights. The 5th Circuit specifically rejected the Indiana Court of Appeals' approach in its reliance upon the legal fiction of implied waiver of due process rights to cure constitutional defects in notice. *Davis Oil Co. v. Mills*, 873 F.2d 774, 788 (5th Cir. 1989). This court should grant Certiorari and incorporate such a holding in its opinion.

The lack of constitutionally adequate notice constituted a jurisdictional defect rendering the tax deed void. At the very beginning of the opinion Chief Justice Roberts writes "**Before** [emphasis added] a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'". *Jones v. Flowers*, 547 U.S.at 222, 126 S.Ct. at 1712, 164 L.Ed.2d. at, 423. Requiring notice "before" selling property for unpaid taxes necessarily therefore makes notice a jurisdictional prerequisite. Constitutionally inadequate notice to the owner of a

property sold at a tax foreclosure is a jurisdictional defect. *Benoit v. Panthaky*, 780 F.2d 336, 339 (3rd Cir. 1985). This jurisdictional concept applies to statutory notice requirements as well. *In Re: Sienkiewicz*, 900 F.2d 206, 208 (9th Cir. 1990), *In Re: Foreclosure of liens*, 922 P.2d 73, 76 (Wash. 1996), *Van Raben Homes Inc. v. Dakota View Estates*, 546 N.W.2d 843, 847 (N.D. 1996). This jurisdictional defect is not waived by failure to redeem. *Van Raben Homes Inc.*, 546 N.W.2d at 846-847. In such circumstances the tax sale and tax deed are void. *In Re: Foreclosure of Liens*, 922 P.2d at 76, *In Re: Sienkiewicz*, 900 F.2d at 208, (see also *F.D.I.C. v. Lee*, 130 F.3d 1139, 1143 (5th Cir. 1997) (holding tax sale of property void because sheriff's failure to give statutorily required notice to and obtain consent of F.D.I.C.). The statute of limitations for an action to set aside a tax sale will not run for a sale conducted without constitutionally adequate notice. *Grobien v. Lombardy*, 765 F.Supp 856, 859 (D.Virgin Islands 1991)(upholding delay of 6 years in challenge to tax deed). These authorities teach that the finding of implied waiver by the Indiana Court of Appeals does not remedy the due process violation occasioned by the failure of notice, does not trump Swami's due process right to notice nor resurrect a void judgment for issuance of a tax deed. A claim that a judgment is void necessarily implicates an attack on the trial court's personal or subject matter jurisdiction. *Dusenberry v. Dusenberry*, 625 N.E.2d 458, 461-462 (Ind.Ct.App. 1993). Judgment rendered in violation of due

process is void, *Stidham v. Whelchel*, 698 N.E2d. 1152, 1154 (Ind. 1998) Such judgments may be collaterally attacked at any time. *Id.* at 1156. As this case demonstrates, this rule applies to everyone except those whose property is subject to tax sale.

The record in this matter itself demonstrates the absurdity of the Indiana Court of Appeals' presumption of waiver of Swami's constitutional rights. The Indiana Court of Appeals position is apparently based upon the illogical proposition that Swami, at a time when its property could be redeemed for a modest amount, sat idly by and knowingly, willingly did nothing instead electing to litigate this matter all the way to the United States Supreme Court after the fact. The fact that Swami has so consistently and vigorously contested this matter all the way up to this honorable Court shows that Swami has been ready, willing and able to pay the taxes and would have but for the insufficiency of notice.

B. This Court's opinion in *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d. 415, 426 (2006) and other Courts in Conformity with the *Jones* Opinion are Dispositive on the Merits of this Matter.

The evidence stipulated in the Trial Court was of the effect that the only "notice" given Swami prior to the tax sale came back "Returned to Sender - Undeliverable as Addressed - Unable to Forward"

and "Returned to Sender - No Such Number". After the tax sale "notice" was sent to the same address as before, coming back "Returned to Sender - Not Deliverable as Addressed - Unable to Forward" and "Returned to Sender". Before taking an action which will affect an interest in life, liberty or property protected by the due process of the Fourteenth Amendment the State must provide notice reasonably calculated under the circumstances to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections. *Yoder v. Elkhart County Auditor*, 632 N.E.2d 369, 372 (Ind. 1994) (Trans.Den.) (Cert.Den.), *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795, 77 L.Ed.2d 180, 185, 103 S.Ct. 2706 (1983). While the County also provided notice by publication that, by itself, is insufficient, *Id.* Published notice alone in the absence of actual notice is no more than feint, *Id.* Noting many State and Federal Courts have reached the same conclusion, this Court has specifically held that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold at tax sale. *Jones v. Flowers*, 547 U.S. 220, 225, 126 S.Ct. 1708, 1713, 164 L.Ed.2d. 415, 425 (2006)(citations omitted). Of significance here, Chief Justice Roberts then went on to point out that Indiana law is not in accord with this Court's holding in *Jones*. 547 U.S. at 227, 126 S.Ct. at 1715, 164 L.Ed.2d at 426, (citing *Elizondo v. Read*, 588 N.E.2d 501, 504 (Ind. 1992)). The proceedings

below clearly illustrate that the Courts of the State of Indiana do not adhere to this Court's holding in the *Jones v. Flowers* case cited above. The members of this Court commented in *Jones* that they would not think that one who actually desired to inform a real property owner of an impending tax sale of his property would do nothing more when a certified letter sent to the owner is returned unclaimed. *Id.* 547 U.S. at 229, 126 S.Ct. at 1716, 164 L.Ed.2d at 427. There, this Court rejected as sufficient notice that consisted of no more than unclaimed certified mail. *Jones v. Flowers*, 547 U.S. at 225, 126 S.Ct. at 1713, 164 L.Ed.2d at 425. There, one notice was sent by certified mail and came back unclaimed, notice was given by publication and then a second notice was sent by certified mail and also came back unclaimed. *Id.* 547 U.S. at 223-224, 126 S.Ct. at 1712, 164 L.Ed.2d at 424. This was found to be insufficient notice thus effecting a procedural due process violation. *Id.* 547 U.S. at 225, 239, 126 S.Ct. at 1713, 1721, 164 L.Ed.2d at, 423, 434, (see also *Luessehnop v. Clinton County, New York*, 466 F.3d 259, 270 (2nd Cir. 2006) applying *Jones v. Flowers*) and *Plemons v. Gale*, 396 F.3d 569, 573 (4th Cir. 2004)). State courts have reached the same result. *Bank of America v. Giant*, 93 Cal.Rptr. 2d 626, 631-632 (Cal.Ct.App. 2000), *St. George Antiochian Christian Church v. Aggarwal*, 603 A.2d 484, 490 (Md. 1992).

The course of events as to notice here are practically identical with those in *Jones* if not even more troubling since the notices sent here could not

have been claimed because they were returned as undeliverable which strongly suggesting a bad address as opposed to unclaimed which could simply result from one failing to pick up their certified mail from the post office.

This Court's decision in *Jones* is significant to this case in yet another fundamental way. As noted above, in the first, pre *Jones* case, the Indiana Court of Appeals held that, notwithstanding the fact that Swami had been misinformed by the County Auditor's office, since Swami had failed to file a change of address notice it had forfeited its right to constitutionally sufficient notice, to object to lack of notice and to rely upon information provided by the Auditor's office, *Swami Inc. v. Lee,* 841 N.E.2d 1173, 1178-1179 (Ind.Ct.App. 2006) (Trans.Den.). This Court stated in this regard in *Jones*: "The Commissioner does not argue that Jones' failure to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree". *Jones*, 547 U.S. at 232, 126 S.Ct. at 1717, 164 L.Ed.2d at 429. This argument that the Arkansas Land Commissioner prudently chose not to advance is just what the Indiana Court of Appeals has declared to be the law of Indiana, *Swami Inc.*, 841 N.E.2d at 1178-1179. Indiana's approach has been universally rejected by this and other courts. A party's ability to take steps to safeguard its interests does not relieve the state of its constitutional obligations. *Jones v. Flowers*, *Jones*, 547 U.S. at 232, 126 S.Ct. at 1717, 164 L.Ed.2d at 429,

Mennonite Board of Missions v. Adams, 462 U.S. at 799, 77 L.Ed.2d at 188, *Plemons v. Gale*, 396 F.3d at 574, *Schwartz v. Dey*, 665 S.W.2d 933, 935 (Mo.banc. 1984), *O'Brien v. Port Lawrence Title and Trust Company*, 688 N.E.2d 1136, 1141 (Ohio.Com.Pl. 1997), *Grobien v. Lombardy*, 765 F.Supp. at 860. Even if it could be argued that, with the benefit of 20-20 hindsight, it appears that Swami could have and should have more diligent in seeking to save its property from tax sale, the fact that an owner should have been more diligent does not excuse constitutionally inadequate notice. *Jones*, 547 U.S. at 234, 126 S.Ct. at 1718, 164 L.Ed.2d at 430.

This case teaches that, rather than considering the drastic remedy of tax sale as a last resort to collect delinquent taxes, Indiana Courts apply Indiana's tax sale statute in such a way as to promote alienation of as much property as possible from the hands of taxpayers who have, for whatever reason, fallen behind in their taxes to the hands of tax sale investors. Indiana Courts have never recognized the concept which should be intuitive and which other jurisdictions have specifically recognized and articulated, that the primary purpose of the tax sale law is not to divest owners of their property, but to provide a method for collecting taxes, *Sonderman v. Remington Construction Company Inc.*, 603 A.2d 1, 8 (N.J. 1992). Justice Flaherty of the Pennsylvania Supreme Court articulated this principle very eloquently stating:

> "Somehow, over the years, taxing authorities have lost sight of the fact that it is a momentous event under the United States and Pennsylvania Constitutions when a government subjects a citizen's property to forfeiture for non-payment of taxes. We have had occasion before to note that we hold no brief with wilful, persistent and long standing tax delinquents, but at the same time, we have also observed that the "strict provisions of the Real Estate Tax Sale Law were never meant to punish taxpayers who omitted through oversight or error...to pay their taxes." *Ross Appeal*, 366 Pa. 100, 107, 76 A.2d 749, 753 (1950). As this Court stated in *Hess v. Westerwick*, "the purpose of tax sales is not to strip the taxpayer of his property but to insure the collection of taxes." 366 Pa. 90, 98, 76 A.2d 745, 748 (1950)., *Tracy v. County of Chester, Tax Claim Bureau*, 489 A.2d 1334, 1339 (Pa. 1985).

If Justice Flaherty had been presiding in this case, it would not be necessary for Swami to ask this court to grant Certiorari to uphold this fundamental principle.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. 08-481 OCT 6 - 2008

IN THE OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

SWAMI INC.
Petitioner,

v.

ROBERT LEE in his capacity as Allen County Treasurer,
THERESE BROWN in her capacity as Allen County Auditor,
and THELMA RETZ
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 02A03-0706-CV-254

SWAMI INC.,
Respondent-Appellee,
v.
ROBERT LEE[1], in his capacity as Allen County Treasurer, THERESE BROWN, in her capacity as Allen County Auditor and THELMA RETZ,
Plaintiffs-Appellants

Appeal from the from the Allen County Indiana Circuit Court Cause No. 02C01-0208-PL-109
The Honorable Thomas J. Ryan, Senior Judge.

DECIDED JANUARY 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION-CRONE, Judge

Case Summary

Thelma Retz appeals the grant of the motion for relief from judgment filed by Swami, Inc., pursuant to Indiana Trial Rule 60(B)(6). We reverse.

---

[1] Plaintiffs Lee and Brown did not participate in this appeal. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

Issue

The sole issue for our review is whether the trial court erred in granting Swami's motion for relief from judgment.[2]

Facts and Procedural History[3]

Swami is a for-profit Indiana corporation. In 1999, Swami purchased a parcel of real property in Allen County, located at 9100 Illinois Road in Fort Wayne ("the Property"). Swami paid no property taxes on the Property from May 11, 2000, through July 2002. In July 2002, the Allen County treasurer's office certified the Property for placement in the 2002 Allen County fall tax sale.

At all relevant times, Swami's principal place of business was the residence of its president, Subhash Reddy. Reddy changed residences four times during the three-and-a half-year period following Swami's purchase of the Property, but Swami never filed a notarized change of address affidavit or notarized letter seeking a change of

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[2] Swami claims that Retz's statement of the case is argumentative and requests that we strike it. We agree that portions of Retz's statement of the case belong in her argument section, and hereby grant Swami's motion to strike as to those portions. Indiana Appellate Rule 46(A)(6) specifies that the statement of the case "shall briefly describe the nature of the case, the course of the proceedings relevant to the issues presented for review, and the disposition of these issues by the trial court[.]"

[3] We hereby deny Swami's motion to strike Retz's statement of facts.

address. The Allen County auditor's office sent a notice of tax sale to Swami's address of record, but it was marked "Undeliverable as Addressed" and returned to the auditor's office. Appellant's App. at 535-36, 547. The auditor's office searched its records and a local phonebook, but found no other address for Swami. The auditor's office sent a second notice to Swami addressed to an adjoining property owned by Swami, but that was returned to the auditor's office marked "No Such Number." *Id.* at 537, 548. Additional notice of the tax sale was posted at a public place of posting and published in two local newspapers for three consecutive weeks prior to the tax sale.

Retz bought the Property at the 2002 tax sale. The price Retz paid for the Property exceeded the delinquent fees and taxes owed on the Property, and the surplus was claimed by Swami's agent, National Cash Refund, Inc.

During the one-year redemption period, the auditor's office sent notice to Swami that the tax sale had taken place. The notice was returned as undeliverable. *Id.* at 540, 562. A title search on the Property revealed Mid Am Bank, the mortgagee of record, as the only person with a substantial property interest of public record. The auditor's office also sent notice of the tax sale to Mid Am Bank, which was accepted.

After the redemption period expired, another notice was sent to Swami and returned. *Id.* at 542, 567. An identical notice sent to Mid Am Bank was accepted. On October 8, 2003, the auditor's office

filed a petition with the trial court, requesting authority to issue a tax deed to Retz for the Property. On November 14, 2003, the trial court ordered the issuance of the tax deed to Retz. *Id.* at 118. On November 24, 2003, the auditor's office transferred and conveyed to Retz a tax deed for the Property[4].

On January 12, 2004, Swami filed its verified objection to the issuance of tax deed, in which it stated that it had never received notice of the tax sale and had no actual knowledge of the tax sale or actions related to it.4 *Id.* at 123-24. On January 30, 2004, Retz moved to intervene. On March 31, 2005, Retz filed a motion for summary judgment, arguing that

> [(1)] the Auditor's Office properly performed all essential acts concerning the tax sale and substantially complied with the statutory procedures, thus satisfying due process requirements [; (2)]

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[4] Pursuant to Indiana Code Section 6-1.1-25-4.6(h), "[a] tax deed issued under this section is incontestable except by appeal from the order of the court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court's order." The issuance of a tax deed can be appealed under this statute by either an independent action or a Trial Rule 60(B) motion in the same trial court that issued the original tax deed. *B. P. Amoco Corp. v. Szymanski*, 808 N.E.2d 683, 690 (Ind. Ct. App. 2004), *trans. denied*. Swami initially brought an independent action.

> Swami failed to rebut the prima facie evidence regarding the regularity and validity of the tax sale proceedings [; (3)] notice to Swami at its last known address was adequate and Swami's failure to inform the Auditor's Office of its current address precludes its lack of notice defense [; (4)] Swami waived its right to the [Property] by claiming the entire Surplus fund from the County.

Id. at 63, 66, 68, 71. Swami filed a cross motion for summary judgment, arguing that it satisfied the statutory requirements necessary to defeat the tax deed, that it was entitled to a cancellation of the tax deed based on theories of equity, and that the Property was taken from it without just compensation in violation of federal and state constitutional guarantees. *Id.* at 154-68. The trial court granted Retz's motion for summary judgment and denied Swami's cross motion for summary judgment.

Swami appealed, raising the following issues:

> 1. Whether the trial court erred when it applied the plain meaning of the words and phrases in Indiana Code Section 6-1.1-25-16[5] and refused to set aside a tax sale.

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[5] Indiana Code Section 6-1.1-25-16 provides:

2. Whether Swami is entitled to relief under Indiana Trial Rule 60(B) based on an alleged misrepresentation by an employee in the Allen County Treasurer's Office regarding the amount of real property taxes due.
3. Whether [the limitation of remedies in] Indiana Code Section 6-1.1-25-16 violates a taxpayer's [substantive] due process rights under the United States

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A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if:
(1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
(2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
(3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
(4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
(5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
(6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
(7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections.

> Constitution and the Indiana Constitution.

Swami, Inc. v. Lee, 841 N.E.2d 1173, 1174 (Ind. Ct. App. 2006), *trans. denied*. In affirming the trial court, we held that (1) Swami failed to inform the auditor's office of its change of address and therefore was not entitled to equitable relief; (2) Swami did not file a Trial Rule 60(B) motion with the trial court and therefore could not challenge the tax deed on that basis at the appellate level; and (3) the limitation of remedies provided by Indiana Code Section 6-1.1-25-16 did not violate substantive due process rights. *Id.* at 1180-81. We noted that Swami did not contend that the auditor failed to comply with notice requirements. *Id.* at 1180.

On March 8, 2006, Swami petitioned for transfer to the Indiana Supreme Court presenting the following question:

> Whether this case presents an important question of law and a question of great public importance that has not been, but should be, decided by the Supreme Court where the Court of Appeals concluded that equity should not intervene to set aside a tax sale deed where a landowner's representative was given inaccurate information about property taxes owed and a pending tax sale by a

> county official responsible for collection of property taxes.

Appellant's App. at 306. On April 26, 2006, the United States Supreme Court decided *Jones v. Flowers*, 547 U.S. 220 (2006), in which the court held that when notice of a tax sale is mailed to the owner and returned undelivered, the Due Process Clause of the Fourteenth Amendment requires the government to take additional reasonable steps to provide notice before taking the owner's property. 547 U.S. at 234. On May 16, 2006, while transfer was still pending, Swami filed a verified motion to remand so that the trial court could examine whether Indiana's statutory notice requirements satisfied federal due process rights in light of the *Flowers* decision. *See* Ind. Appellate Rule 37 ("At any time after the Court on Appeal obtains jurisdiction, any party may file a motion requesting that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court or Administrative Agency for further proceedings."). On July 6, 2006, the Indiana Supreme Court denied transfer without ruling on Swami's motion to remand.

On August 25, 2006, Swami filed the motion for relief from judgment pursuant to Trial Rule 60(B)(6) that is the subject of this appeal. In the motion, Swami alleged that the "Allen County Auditor's efforts to provide notice to Swami of the tax sale and petition for tax deed were insufficient to satisfy due process given the circumstances of

this case. Consequently, the tax sale and tax sale deed are void." Appellant's App. at 448. The trial court granted Swami's motion. Retz appeals.

Discussion and Decision

Swami filed a motion for relief from judgment pursuant to Indiana Trial Rule 60(B)(6), which provides in relevant part, "On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default for the following reasons: ... (6) the judgment is void[.]" Normally, we apply an abuse of discretion standard in reviewing a trial court's ruling on a motion for relief from judgment. *Hotmix & Bituminous Equip. Inc. v. Hardrock Equip. Corp.*, 719 N.E.2d 824, 826 (Ind. Ct. App. 1999). "However, the standard of review for the granting of a motion for relief from judgment made pursuant to Trial Rule 60(B)(6), alleging that the judgment is void, requires no discretion on the part of the trial court because either the judgment is void or it is valid."[6] *Id.* A Trial Rule 60(B) motion for relief from judgment may not be used as a substitute for a direct appeal. *Goldsmith v. Jones*, 761 N.E.2d 471, 474 (Ind. Ct.

[6] Swami incorrectly asserts that two distinct standards of review apply to our review of the trial court's decision to grant its motion for relief from judgment

App. 2002). It affords relief only in extraordinary circumstances that are not the result of any fault or negligence on the part of the movant. *Id.*

Swami asserts that the Allen County auditor failed to provide constitutionally adequate notice to Swami of the tax sale and the issuance of the tax deed,[7] and therefore the trial court's order issuing

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[7] We have discussed constitutional due process requirements as to notice:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected ...." The constitutional requirements are satisfied if these conditions are reasonably met with "due regard for the practicalities and peculiarities of the case."

Diversified Inv., LLC v. U.S. Bank, NA, 838 N.E.2d 536, 539-40 (Ind. Ct. App. 2005) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)), *trans. denied* (2006).

the tax deed to Retz was void ab initio.[8] In support, Swami cites *White v. White*, 796 N.E.2d 377 (Ind. Ct. App. 2003). There, P.S. was born to unmarried parents, and P.S.'s great-grandmother was appointed as legal guardian of P.S. In a *separate* paternity and support proceeding, the trial court ordered P.S.'s father to make child support payments to P.S.'s guardian. Later, mother and father filed a petition in the guardianship action to terminate guardianship proceedings. P.S.'s guardian did not receive notice of the petition. The trial court terminated the guardianship without a hearing the day the motion was filed. Also that same day, mother and father filed a stipulation and agreement in the paternity and support action asking the trial court to terminate the support order requiring father to pay P.S.'s guardian. The trial

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[8] There is a distinction between the terms "void" and "voidable."

> That which is "void" has no legal effect at any time and cannot be confirmed or ratified by subsequent action or inaction. That which is "voidable" has legal effect until such time as challenged in the appropriate manner and can be ratified or confirmed by subsequent action or inaction. A judgment (or appealable order) that is voidable may only be attacked through a direct appeal, whereas a void judgment is subject to collateral attack.

Chapin v. Hulse, 599 N.E.2d 217, 220 (Ind. Ct. App. 1992)

court entered an order giving custody of P.S. to father and vacating the support order immediately.

P.S.'s guardian timely filed a motion to correct error in the guardianship action, asking the trial court to vacate the order terminating her guardianship of P.S., which the trial court granted. A deputy prosecutor filed an information in the paternity and support action alleging that father had failed to pay child support. The trial court ruled that father was not behind in child support because no child support order had been in existence since the trial court vacated the support order. P.S.'s guardian filed a motion to correct error, which was denied, and she appealed. We held that because the guardian was not notified of the petition to change custody and terminate support, the order terminating father's responsibility to pay child support was void. *Id.* at 383.

White is inapplicable to this case. Unlike the motion to correct error filed in the child support action by P.S.'s guardian, Swami's motion for relief from judgment was not the first opportunity Swami had to challenge the issuance of the tax deed.[9]

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[9] Swami's reliance on *Stidham v. Whelchel*, 698 N.E.2d 1152 (Ind. 1998), is also misplaced. There, our supreme court stated that "a default judgment that is rendered

Inasmuch as Swami has already availed itself of the opportunity to challenge the issuance of the tax deed, Retz argues that principles of res judicata and waiver prohibit Swami from raising its due process argument through a Trial Rule 60(B) motion.[10] Assuming, *without deciding*, that

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without minimum contacts violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and is void." *Id.* at 1154. *Stidham* involved a default judgment and lack of personal jurisdiction, neither of which is present here. *See, e.g., Tax Certificate Invs., Inc. v. Smethers*, 714 N.E.2d 131, 133 n.2 (Ind. 1999) (observing that adequacy of notice is a different question from trial court's exercise of personal or subject matter jurisdiction). Also, Stidham never had his day in court to challenge the judgment entered against him until he brought the motion for relief of judgment that was the subject of the appeal.

[10] Swami attempts to frame Retz's argument in terms of the law of the case doctrine. Appellee's Br. at 17. The law of the case doctrine is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially similar facts. *Rosby Corp. v. Townsend, Yosha, Cline & Price*, 800 N.E.2d 661, 664 (Ind. Ct. App. 2003), *trans. denied* (2004). To invoke the law of the case doctrine, the matters decided in the prior appeal clearly must appear to be the only possible construction of an opinion, and questions not conclusively decided in the prior appeal do not become the law of the case. *Id.* Here, Swami did not argue in a prior appeal that the notice provided by the auditor violated its due process rights. Therefore, the law of the case doctrine is inapplicable. *See, e.g., Learman v. Auto Owners Ins. Co.*, 769 N.E.2d 1171, 1175 (Ind. Ct. App. 2002) ("In the prior

the auditor's notice of the tax sale and issuance of the tax deed did not comply with federal due process requirements, we agree with Retz that the principle of res judicata bars Swami from claiming that the order issuing the tax deed is void.

> Res judicata serves to prevent repetitious litigation of disputes that are essentially the same. The doctrine of res judicata is divided into two distinct branches, claim preclusion and issue preclusion. Claim preclusion is applicable when a final judgment on the merits has been rendered and acts to bar a subsequent action on the same claim between the same parties. When claim preclusion applies, all matters that were or *might have been litigated are deemed conclusively decided by the judgment in the prior action.* Claim preclusion applies when the following four factors are present: (1) the former judgment was

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appeal, we determined whether the trial court erred by granting summary judgment to Auto-Owners based upon express and implied permission principles. We must now determine whether the trial court erred by granting judgment to Auto-Owners based upon actual or apparent agency principles. Because the actual or apparent agency theory was not argued in the prior appeal, the law of the case doctrine is inapplicable.")

> rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, *or could have been*, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies.

Dawson v. Estate of Ott, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003) (emphases added) (citations omitted). "'Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.' To hold otherwise would constitute an 'unprecedented departure from accepted principles of res judicata.'" *Perry v. Gulf Stream Coach, Inc.*, 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981)) (citations omitted).

Here, only one element of claim preclusion is contested: whether the matter now in issue could have been determined in the prior action. Swami argues that its inadequate notice claim was not available until *Flowers* was decided, which occurred after Swami had filed its petition for transfer. Swami asserts, "Prior to the *Flowers* decision, the law in Indiana was well-settled with

respect to the Constitutional notice requirements in tax sale cases□substantial compliance with Indiana's tax sale notice requirements was considered sufficient." Appellee's Br. at 18 (citing *Diversified Inv., LLC v. U.S. Bank, N.A.*, 838 N.E.2d 536, 542 (Ind. Ct. App. 2005)).[11] We disagree.

In *Diversified*, the plaintiff made the same argument that Swami claims was unavailable to it, that is, that Indiana's statutory notice procedures were constitutionally insufficient for the circumstances. *See Diversified*, 838 N.E.2d at 542-43. Contrary to Swami's assertion that it would have been sanctioned for making this argument, the plaintiff in *Diversified* was not sanctioned. Although under the particular facts of that case this Court held that the notice provided by the auditor's office was constitutionally adequate, it

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[11] Swami also cites *Clark v. Jones*, 519 N.E.2d 158 (Ind. Ct. App. 1988), in which we stated, "Even if the auditor knew that mail was being returned from that address, the notice statute and constitutional due process requirements do not impose upon the auditor a duty to search for an alternative address." *Id.* at 159. We disagree that *Clark* illustrates that Indiana law was radically different from the decision in *Flowers*. The *Flowers* court declined to prescribe the form of service that the government should adopt and emphasized that while "[appellant] believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls[, w]e do not believe the government was required to go this far." 547 U.S. at 236-37

does not follow that the same result would have been reached in Swami's case had Swami brought such a challenge. *See McBain v. Hamilton County*, 744 N.E.2d 984 (Ind. Ct. App. 2001) (holding that upon return of notice to the auditor with a more recent mailing address, due process requires auditor to send notice to the property owner at alternate address). In fact, the *Diversified* court noted that "when notices mailed by a county auditor are returned in their entirety as undeliverable, with an alternative address indicated on the envelope, or where notices are returned as undeliverable due to an address discrepancy of which the auditor is deemed aware, it is incumbent upon the auditor to take further action to effectuate notice reasonably calculated to apprise an interested party of tax sale proceedings." 838 N.E.2d at 543.

We conclude that Swami's claim that the notice provided by the auditor was in violation of his due process rights was available and could have been litigated during its earlier challenge.[12]

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[12] We also disagree with Swami that *Flowers* drastically changed Indiana law. The *Flowers* court noted that its decision was in accord with its previous decisions, in that these decisions all "deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent." 547 U.S. at 226. The *Flowers* court then observed that "[t]he Courts of Appeals and State Supreme Courts have addressed this question on

Accordingly, Swami is precluded by the doctrine of res judicata from claiming that the tax deed is void due to inadequate notice.[13] *See Shepherd v. Truex*, 823 N.E.2d 320, 326 (Ind. Ct. App. 2005) (holding that appellant's independent action for fraud on the court pursuant to Ind. Trial Rule 60(B), which in many circumstances is a collateral attack on a judgment, is subject to the doctrine of res judicata). In sum, the trial court erred in

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frequent occasions, and most have decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale." *Id.* at 227. Indeed, the *Flowers* court stated, "In particular, we disclaim any new rule that is contrary to [*Dusenbery v. United States*, 534 U.S. 161 (2002)] and a significant departure from [*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)]. *Id.* at 238.

[13] We further note that because Swami had not argued to the trial court that the auditor's notice violated federal due process in its first challenge, this Court would have found the issue waived on direct appeal had Swami attempted to raise it there. *See, e.g., Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000) (appellant who failed to argue violation of due process to trial court waived issue for appellate review); *Hite v. Vanderburgh County Office of Family & Children*, 845 N.E.2d 175, 180 (Ind. Ct. App. 2006) (father never objected to termination because he lacked notice of CHINS proceeding and therefore due process argument was waived on appeal); *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003) (failure to raise constitutional due process challenge waives issue for appellate review)

granting Swami's motion for relief from judgment, and therefore we reverse.

Reversed.

DARDEN, J., and MAY, J., concur.

APPENDIX B

STATE OF INDIANA)		
	) SS:	IN THE ALLEN
COUNTY OF ALLEN)		CIRCUIT COURT
ROBERT LEE, Allen	)	
County Treasurer, and	)	
LISBETH A. BLOSSER,	)	
Allen County Auditor,	)	
Plaintiffs,	)	
	)	
vs.	)	Cause No.02C01-
	)	0208-PL-109
3607 COMPANY, P.L.L,	)	
and All Other SImilarly	)	
Situated Delinquent,	)	
Taxpayers of Real Property	)	
Taxes,	)	
Defendants.	)	

ORDER OR JUDGMENT OF THE COURT

The Trial Rule 60(B) Petition of Swami, Inc. is granted in part subject to findings of fact and conclusions of law filed by separate order.

The parties are requested to contact the Court and arrange an evidentiary hearing pursuant to the authority of *Jones v. Flowers* as argued and cited in the Trial Rule 60(B) Petition of Swami, Inc.

Further, a case management conference may be scheduled by contacting Stephanie Kohrman, Judicial Assistant, Second Floor, Courthouse Annex at (260) 449-4004.

DATED: December 7, 2006

/s/
Thomas L. Ryan, Senior Judge
Allen Circuit Court

cc: Thomas A. Hardin, 2801 Beaver Avenue, Fort Wayne, IN 46807
Matthew J. Elliott/Andrea Dick, Courthouse Mail #87
Andrew S. Williams, Courthouse Mail #30

APPENDIX C

STATE OF INDIANA	)	
	)	SS: IN THE ALLEN
COUNTY OF ALLEN	)	CIRCUIT COURT
ROBERT LEE, Allen	)	
County Treasurer, and	)	
LISBETH A. BLOSSER,	)	
Allen County Auditor,	)	
Plaintiffs,	)	
	)	
vs.	)	Cause No.02C01-
	)	0208-PL-109
3607 COMPANY, P.L.L,	)	
and All Other SImilarly	)	
Situated Delinquent,	)	
Taxpayers of Real Property	)	
Taxes,	)	
Defendants.	)	

JUDGMENT UPON SWAMI, INC.'S TRIAL RULE 60(B) MOTION

Swami, Inc. (Swami) returns to argue that *Jones v. Flowers* (2006), 126 S.Ct. 1708, 1718 decided April 26, 2006 after the decision of the Court of Appeals of Indiana on appeal of this case dated February 8, 2006 excepts Swami from the waiver arguments of Retz, *et al.* and the law of the case, so far as it goes, as established by opinion of the Court of Appeals.

"... The (county) should have taken additional reasonable steps to notify (Swami, Inc.) if practicable to do so." *Jones, supra.*

Swami cannot be held to anticipate and to waive a constitutional issue not yet decided nor known to it.

The Trial Court, as did the Court of Appeals, decided the original issue as a matter of law on "... strictly applied..." terms of Indiana Code 6-1.1-25-16. See, Slip Op. at p. 8.

Because the trial court postured and the Court of Appeals decided § 16 both strictly and literally, neither court considered the fact sensitive issue of the **application** of § 16, paragraph seven (7) and the reasonableness of the county's effort to ensure the integrity of the tax sale **after** the county has actual knowledge that the notice process had failed.

As the *Jones* court reasoned, it mattered not what Swami did or failed to do in respect to its interests, the county's constitutional obligations remained. *Supra,* at p. 1717. The trial Court's summary judgment and the Court of Appeal's affirmance thereof foreclosed judicial inquiry into the application § 16(7) and the reasonableness of the county's steps following its knowledge that the notice process had failed. At these stages of the tax sale process, Swami can not be charged

prospectively with the reasoning and decision of the United States Supreme Court in *Jones*.

Summary judgment as applied in this case is the antithesis of fair notice and opportunity to be heard. Remediation is not all of § 16. Sub-section (7) implicitly includes both the fundamental and the substantive rights of notice.

As the *Jones* court noted and thereby implied, although it is not responsible for drafting an acceptable notice process, the court knows (as did the government) when as applied process fails and further reasonable steps must be taken in order to meet constitutional standard. "...(G)iven the circumstances of this case... (the court is)... confident that additional reasonable steps were available for (the county) to employ before taking (Swami's) property.

This Court was deficient for summarily deciding that proof of those steps was immaterial and that genuine issues were absent.

This court misapprehended the constitutional duty of the county since it concluded as a matter of law that substantial compliance "*ex ante*" with "...the notices required by... sections 4.5 and 4.6 of this chapter..." satisfied both the county's constitutional duty and the court's duty of judicial review to the exclusion of considering"...what the government does with that information in assessing

the adequacy of the chosen procedure." *Supra*, at p. 1717.

This court concludes, as did *Jones*, that "... at the end of the day, that someone who actually wanted to alert (Swami)... would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done." *Supra*, at p. 1721.

This burden resets with and remains on the county to prove and with the court to consider "... what the government does with that information (of failed notice) in assessing the adequacy of the chosen procedure." *Supra*, at p. 1717.

DATED: December 13, 2006

/s/
Thomas L. Ryan, Senior Judge
Allen Circuit Court

cc: Andrew Williams, P.O. Box 11489, 803 S. Calhoun Street, 9th floor, Fort Wayne IN 46858
Thomas A. Hardin, Esq., 2810 Beaver Ave., Fort Wayne IN 46807
Patrick Hess, Esq., Matthew Elliott, Esq., Andrea Dick., Esq., 200 E. Main Street, Suite 800, Fort Wayne IN 46802

APPENDIX D

STATE OF INDIANA)
) SS: IN THE ALLEN
COUNTY OF ALLEN) CIRCUIT COURT

ROBERT LEE, Allen County Treasurer, and LISBETH A. BLOSSER, Allen County Auditor, Plaintiffs,	)	
vs.	)	Cause No.02C01-0208-PL-109
3607 COMPANY, P.L.L, and All Other SImilarly Situated Delinquent, Taxpayers of Real Property Taxes, Defendants.	)	

CHRONOLOGICAL CASE SUMMARY
OF MAY 15, 2007

PARCEL 1974: ORDER ENTERED. UPON REMAND, THE PARTIES HAVE FILED JOINT STIPULATIONS, WHICH, TOGETHER WITH INFERENCES, ARE ADOPTED AS FINDINGS OF THE COURT. THE COURT CONCLUDES THAT THE EVIDENCE AND INFERENCES THEREFROM FAIL TO PREPONDERATE THAT

THE COUNTY TOOK ADDITIONAL PRACTICABLE AND REASONABLE STEPS TO PROVIDE ADEQUATE NOTICE TO SWAMI, ITS PRINCIPALS, AGENTS AND PERSONS IN PRIVITY TO SWAMI HAVING A SUBSTANTIAL PROPERTY INTEREST OF PUBLIC RECORD AFTER THE FIRST NOTICE OF TAX SALE SENT JULY 23, 2002 FAILED AND WAS RETURNED UNCLAIMED.

SWAMI IS ENTITLED TO T.R. 60(B) RELIEF FROM THIS COURT'S JUDGMENT. JONES V. FLOWERS CONTROLS. INDIANA'S NOTICE STATUTES ARE NOT CONCLUSIVE. THE JUDICIAL REVIEW PROCESS OF A TAX SALE IS A SAFETY NET AND EXISTS TO CURE UNFAIR CIRCUMSTANCES SUCH AS INSUFFICIENT PROCESS WHICH IS OTHERWISE DUE A CITIZEN.

THE COUNTY'S REPETITION OF THE NOTICE PROCESS OF THE TAX SALE SERVED TO FACILITATE A PREVIOUSLY FAILED STEP AND BECAME PRO FORMA.

NEITHER THE TAX SALE PURCHASER'S INTEREST IN A WINDFALL FOR THE STATE'S INTEREST (IN PROPERTY TAX REVENUE) COUNTER BALANCES SWAMI'S PROPERTY INTEREST. ALL INTERESTS, SAVE A WINDFALL, PRO FORMA ACCOMODATION OR A FORFEITURE, ARE

PROTECTED IN A PROCESS WHICH ASSUMES THE CONSTITUTIONAL APPLICATION OF A NOTICE PROCESS WHICH INCLUDES LASE RESORT TO THE COURT. THE FIRST JUDGMENT OF THIS COURT IS NOT SUPPORTED WITH EVIDENCE THAT THE COUNTY'S STEPS TO NOTIFY SWAMI WERE REASOBABLE.

THE BURDEN OF GOING FORWARD WITH EVIDENCE AND PROVING THE PROBABLE REASONABLENESS OF NOTICE TO SWAMI IS UPON THE COUNTY. IN THIS, THE COUNTY HAS FAILED.

THE TAX DEED IS SET ASIDE.

THIS ORDER IS FINAL AND APPEALABLE. COURT ISSUED NOTICE TO THE PARTIES. SLK

APPENDIX E

IN THE COURT OF APPEALS OF INDIANA

THELMA RETZ, Appellant-Intervenor,	)
and	)
ROBERT LEE, Allen County Treasurer, and THERESE BROWN, Allen County Auditor, Plaintiffs,	)
vs.	)No.02A03-)0706-CV-254
SWAMI, INC., Appellee-Defendant.	)

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Ryan, Senior Judge
Cause No. 02C01-0208-PL-109
April 1, 2008 MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION
CRONE, Judge

Swami, Inc., petitions for rehearing in *Retz v. Swami, Inc.*, No. 02A03-0706-CV-254 (Ind. Ct.

App. Jan. 25, 2007), in which we reversed the trial court's grant of Swami's motion for relief from judgment. We grant Swami's petition for the sole purpose of clarifying the basis for our decision but affirm our decision in all respects.

In our memorandum decision, we determined that Swami's claim that the auditor failed to provide constitutionally adequate notice to Swami of a tax sale and issuance of the tax deed was available at the time of the underlying litigation, and therefore Swami was barred by the doctrine of res judicata from presenting this argument in its motion for relief from judgment. *Id.*, slip op. at 9-13.

To illustrate that Swami would not have been subject to sanctions for pursuing a claim challenging the constitutionality of the notice provided, we cited *Diversified Investments, LLC v. U.S. Bank, N.A.*, 838 N.E.2d 536 (Ind. Ct. App. 2005). There, U.S. Bank "challenge[d] the statutory notice procedures of Indiana Code sections 6-1.1-25-4.5 and –4.6[14] [fn. 1

[14] [fn. 1 in original] The tax sale process is governed by Indiana Code Sections 6-1.1-24-1 through -14 and 6-1.1-25-1 through -19. Indiana Code Section 6-1.1-24-4 requires, *inter alia*, the county auditor to send notice of the county's application to obtain judgment and order for sale of real property to the last address of the property owner as indicated in the auditor's records. Indiana Code Section 6-1.1-25-4.5 requires, *inter alia*, that notice of the tax sale be sent to the record owner's last address. Indiana Code Section 6-1.1-25-4.6 requires, *inter alia*, that notice of the

in original] as constitutionally insufficient for the circumstances." *Id.* at 542-43. In reviewing this issue, the *Diversified* court noted,

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected ...." *Id.* at 315, 70 S. Ct. 652. The constitutional requirements are satisfied if these conditions are reasonably met with "*due regard for*

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purchaser's petition for issuance of tax deed be sent to the record owner's last address.

> *the practicalities and peculiarities of the case*." *Id.* at 314-15, 70 S. Ct. 652.

Id. at 539-540 (emphases added).

The *Diversified* court found that the notice provided by the auditor satisfied constitutional due process requirements because the auditor could reasonably infer that the notices were properly delivered where the notices were not returned to the auditor as undeliverable and the return receipt postcards were returned with signatures. *Id.* at 543-44. Thus, the *Diversified* court concluded that "with regard for the 'practicalities and peculiarities' of the present facts, we cannot say the auditor failed to meet constitutional due process requirements by giving notice in a fashion not reasonably calculated to apprise U.S. Bank's predecessor-in-interest of the pending tax sale proceedings." *Id.* at 544 (quoting *Mullane*, 339 U.S. at 314).

Here, the circumstances are different from those in *Diversified*, so the fact that notice was found to satisfy constitutional due process in *Diversified* does not necessarily dictate the same result in this case[15][fn. 2 in original]. More importantly,

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[15] [fn. 2 in original] Likewise, we acknowledge that the circumstances here are different from those in *McBain v. Hamilton County*, 744 N.E.2d 984 (Ind. Ct. App. 2001). In citing that case, we did not mean to suggest that Swami could have made the exact same argument as the McBains. Instead, we cited it as an example in which the assessment

Diversified demonstrates that a claim challenging whether substantial compliance with Indiana's tax sale notice requirements satisfied due process was available because tax sale procedural due process claims are reviewed on a case-by-case basis. Thus, Swami had the opportunity to argue that the auditor's notice was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

Any modification in the law resulting from the decision in *Jones v. Flowers*, 547 U.S. 220 (2006), cannot alter the fact that Swami had the opportunity to present constitutional claims regarding the auditor's provision of notice in the underlying litigation. *See Bd. of Comm'rs of Adams County v. State ex rel. Gibson*, 226 Ind. 633, 638, 82 N.E.2d 891, 892 (1948) ("The fact that the statute upon which the trial court based its first finding and judgment was afterward declared unconstitutional in a different action between other and different parties could in no way affect the force or conclusiveness of the judgment in that first case."). Simply put, Swami had an opportunity to present a claim that the auditor's notice failed to comply with constitutional due process in the underlying litigation and chose

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of the "practicalities and peculiarities" of the case led the court to conclude that the notice provided was constitutionally inadequate.

not to pursue that line of argument; Swami may not take a second bite at the apple. We affirm our original decision in all respects.

DARDEN, J., and MAY, J., concur.

APPENDIX F

IN THE INDIANA SUPREME COURT
CAUSE NO. 02S_____
COURT OF APPEALS CAUSE NO.
02A03-0706-CV-254

THELMA RETZ, Appellant-Intervenor,	)
and	)
ROBERT LEE, Allen County Treasurer, and THERESE BROWN, Allen County Auditor, Plaintiffs,	)
vs.	)No.02A03-)0706-CV-254
SWAMI, INC., Appellee-Defendant.	)

APPEAL FROM THE ALLEN
CIRCUIT COURT
The Honorable Thomas J. Ryan, Senior Judge
Cause No. 02C01-0208-PL-109

INDIANA SUPREME COURT ORDER DENYING
TRANSFER JULY 10, 2008

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAD HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES. BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.
RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR. KJ

Respectfully submitted,

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No. 08-481

Supreme Court, U.S.
FILED
NOV 10 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SWAMI INC.

Petitioner,

v.

ROBERT LEE in his capacity as Allen County Treasurer, THERESE BROWN in her capacity as Allen County Auditor, and THELMA RETZ,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

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QUESTIONS PRESENTED

Whether certiorari should be granted where the Indiana courts decided this case on the basis of Indiana law, specifically, that the Petitioner was barred by res judicata from raising a due process claim because it raised and then abandoned the very same claim in an earlier proceeding?

Whether certiorari should be granted where Petitioner has admitted that actual notice of the tax sale would not have changed the outcome?

Whether certiorari should be granted where, regardless of whether Petitioner's claim is barred by res judicata, the notice provided by the Auditor's office satisfied due process in any event?

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INTRODUCTION

Although Petitioner has done its best to focus the Court's attention on its due process claim, the simple fact is that this case was decided on the basis of res judicata, an issue of state law. Approximately five years ago, Petitioner first challenged the tax sale at issue here by claiming that the notices provided by the Auditor's Office violated its due process rights. During the course of that litigation, Petitioner abandoned the due process claim in favor of other constitutional and state law arguments. After losing at every level of the Indiana court system, Petitioner chose not to appeal to this Court. Instead, it relaunched its due process claim in the trial court. On appeal, the Indiana Court of Appeals twice concluded that Petitioner's attempt to resuscitate the due process claim was barred by res judicata. The Indiana Supreme Court declined to review this decision, presumably because it involved a routine application of the res judicata doctrine. Because no federal issues are implicated in the Indiana courts' decisions, there is no reason for this Court to grant certiorari.

Even if the Court ignores the res judicata issue, however, granting certiorari would not be appropriate. During the first appeal, Swami represented to the Indiana Supreme Court that actual notice of the tax sale would not have changed the outcome. That representation is a binding judicial admission under Indiana law. Based on that admission, there is no reason to grant certiorari, because even if there were a due process violation, the Petitioner suffered no

harm. Finally, a review of the relevant facts reveals that the tax sale notices provided by the Auditor's Office satisfied due process in any event. For all these reasons, certiorari should be denied.

COUNTERSTATEMENT OF THE FACTS

A. Factual Background.

Thelma Retz ("Retz") agrees with the stipulated facts outlined by Petitioner in its petition for writ of certiorari.

B. Procedural Background.

Although Retz largely agrees with the procedural posture of this case as outlined by the Petitioner, two additional points are worth noting. First, Petitioner's motion for remand during the first appeal to the Indiana Supreme Court raised the very same arguments raised during the second round of litigation launched in the trial court. Although the Indiana Supreme Court did not expressly rule on the motion for remand, the denial of Petitioner's petition to transfer had the same effect. Second, after the Indiana Supreme Court denied transfer in 2006, Swami chose not to appeal to this Court under *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708 (2006) or any other basis, thereby ending the first appeal.

REASONS FOR DENYING THE PETITION

A. Res judicata bars Petitioner from re-asserting the due process claim that it raised and then abandoned during the first litigation.

Petitioner argues that this case is about whether its procedural due process rights were violated. However, it is really about whether res judicata bars Petitioner from re-litigating its due process claim.

Tellingly, Petitioner does not even mention the term "res judicata" in the body of its petition. Rather, it attempts to cast the issue as one of waiver. The problem with this tactic is that the decision of the Indiana Court of Appeals was not based on waiver grounds; it was based on res judicata. Waiver is simply not at issue on this appeal.

Even if waiver were at issue, the result would be no different. First, it is worth noting that waiver is a question of state law and therefore not amenable to review in this Court. Second, and as Petitioner acknowledges, under Indiana law, waiver is appropriate where there has been an "intentional relinquishment or abandonment of a known right." *See, e.g., Martin v. Amoco Oil Co.*, 679 N.E.2d 139, 144-45 (Ind. Ct. App. 1997). Petitioner intentionally relinquished a known right here. Indeed, on April 6, 2004, at the very outset of the underlying litigation, Petitioner asserted as the basis for its challenge to the issuance of the tax deed that

> [p]ursuant to the 14th Amendment to the United States Constitution (due process clause), a state, or in this case a county must provide notice reasonable [sic] calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

In that same pleading, Petitioner sought a declaration that the tax deed was "null and void." During the initial round of litigation, Petitioner intentionally abandoned the procedural due process argument in favor of other ones that it apparently believed had a better chance of success. As a result, this argument was waived.

In an implicit nod to the res judicata problem it faces, Swami also argues that before *Jones v. Flowers* was decided, it could not have raised the due process claim in the underlying litigation, because Indiana law was unfavorable at that time. This argument is disingenuous, because it ignores the fact that the due process claim was the basis for launching the underlying litigation, as noted above. Swami cannot now argue that the due process claim was unavailable simply because it made the tactical decision to abandon it. This is precisely what the doctrine of res judicata is designed to prevent. *See Perry v. Gulf Stream Coach, Inc.*, 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007) ("Res judicata serves to prevent repetitious litigation of disputes that are essentially the same.").

Under res judicata, "all matters that were *or might have been* litigated are deemed conclusively decided by the judgment in the prior action." *Id.* (emphasis in original). As noted by the Indiana Court of Appeals, "Swami had an opportunity to present a claim that the auditor's notice failed to comply with constitutional due process in the underlying litigation and chose not to pursue that line of argument; Swami may not take a second bite at the apple." (Petitioner App. at 34-35).

Even if some Indiana cases had generally held that substantial compliance with Indiana's tax sale statute satisfied due process, that did not prevent Swami from raising a good faith argument to the contrary based on its particular circumstances. This is all the more true since the due process claim arose under federal constitutional law, which the courts nationwide had interpreted differently,[1] and which was constantly evolving. The bottom line is that if Swami, like the plaintiff in *Jones v. Flowers*, had pursued the due process claim in the underlying litigation, it would have had a chance to present the very arguments it is making now. Because Swami chose not to do so, the resulting judgment is binding as to all matters that were or could have been litigated therein. *See Perry*, 871 N.E.2d 1407-48.

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[1] As noted in *Jones v. Flowers*, 126 S.Ct. 1708, 1714-1715 (2006), the courts nationwide were split on whether the government had any additional obligation upon learning that certified notice of a tax sale was returned unclaimed.

Finally, although the decision of the Indiana Court of Appeals was consistent with decades of precedent and is a straightforward application of the doctrine of res judicata, there would be no basis for granting certiorari if it were not. This is so because res judicata rules are a matter of state law, not federal law. *See Jarrard v. CDI Telecommunications, Inc.*, 408 F.3d 905, 916 (7th Cir. 2005). Whether or not the Indiana courts properly interpreted their precedents on res judicata is not a matter appropriate for this Court's review.

In conclusion, the Petition does not support the exercise of this Court's jurisdiction. The Indiana Court of Appeals correctly decided this case on basic principles of res judicata in a manner consistent with longstanding state law. Petitioner could have, and actually did, raise the due process claim before abandoning it in the underlying litigation. As a result, Petitioner was properly barred from re-litigating this issue during the subsequent proceedings.

B. Granting certiorari would be inappropriate because the Petitioner represented to the Indiana Supreme Court that actual notice of the tax sale would have made no difference in the outcome.

Leaving aside the res judicata issue, granting certiorari would also be inappropriate because the Petitioner has admitted that even if it had had actual notice of the tax sale, the result would have been no different. Specifically, during the briefing of the first

appeal to the Indiana Supreme Court, Swami stated to that court as follows:

> *Notice is not relevant under these circumstances. . . . If Swami had received actual notice of the pending tax sale, nothing would have changed.* A representative of Swami . . . would have gone to the county offices and inquired as to the amount owed on the Property. This is exactly what Jyothirmai did, without the notice. The problem is that she was misinformed by the official. Receipt of notice would not have prevented the official from providing Jyothirmai with inaccurate information. . . . *[A]ctual notice was immaterial. It would not have changed the ultimate outcome.* (emphasis added).

Swami's statements are binding judicial admissions under Indiana law. *See In Re K.H.*, 838 N.E.2d 477, 480 (Ind. Ct. App. 2005) ("[A] clear and unequivocal admission of fact by an attorney is a judicial admission which is binding on the client."). As a result, Swami is estopped from now arguing that some form of additional notice issued by the county would have prevented the tax sale. *See, e.g., Dell v. City of Tipton*, 618 N.E.2d 1338, 1342 (Ind. Ct. App. 1993) ("[A] party should be estopped from assuming successive positions in the same litigation with respect to the same fact or set of facts which are inconsistent and mutually contradictory.").

In prior briefing, Swami has tried to get around this conclusion by arguing that even though actual notice was immaterial, the Auditor's Office was still

obliged to afford Swami due process. This argument misses the point. The issue is not whether Swami's judicial admissions excuse the Auditor's Office from providing due process. Rather, it is whether Swami can succeed on a notice-based due process claim when it has admitted that actual notice would not have affected the outcome of that claim.

A fundamental element of any claim, including due process claims, is some form of damage or harm. Indeed, "[t]he due process clause does not mandate procedure for its own sake." *Woods v. City of Michigan City, Indiana*, 940 F.2d 275, 284 (7th Cir. 1991); *Gometz v. Henman*, 807 F.2d 113, 115 (7th Cir. 1986) ("The right of access to the courts, like all procedural rights under the due process clause of the fifth amendment, is an entitlement to enough process to ensure a reasonable likelihood of an accurate result, not to process for its own sake."). By admitting that actual notice would not have changed the outcome of the case, Swami has essentially admitted that any due process violation did not cause any harm. It is hard to imagine how granting certiorari could be appropriate where the issue to be appealed is of no consequence to the outcome to the case.

C. The notice provided by the Auditor's Office in this matter satisfied due process in any event.

Although the Court of Appeals did not reach the merits of Swami's due process argument, the result would have been the same if it had. Basically, the

trial court concluded that under *Jones v. Flowers*, the Auditor's Office should have done more to notify Swami of the impending tax sale. The problem with this conclusion is that the Auditor's office *did* take additional reasonable steps to do so. The steps Swami argues were necessary either would have made no difference (especially since Swami has admitted that actual notice would have made no difference in the outcome of this case), or are not required under *Jones v. Flowers*.

In *Jones v. Flowers*, the Court held that if the government learns that its certified mail notices were unclaimed, it must take "additional reasonable steps to notify [the tax delinquent], if practicable to do so." *Jones v. Flowers*, 126 S.Ct. at 1718. At the same time, the Court took pains not to "prescribe the form of service that the [government] should adopt." *Id.* It did note, however, that potential reasonable forms of notice might include sending the tax sale notices by first class mail or to "occupant," or posting the notices on the property. *See id.* at 1718-1719.

In *Jones v. Flowers*, the certified mail notices were returned "unclaimed." Here, they were returned "Returned to Sender – Undeliverable as Addressed – Unable to Forward." The distinction is important, because "unclaimed" suggests that the addressee may still live at the property, while "Undeliverable as Addressed – Unable to Forward" suggests that the addressee has moved. If the addressee has moved, of course, first class mail notice and/or posting are unlikely to provide actual notice.

In any event, unlike in *Jones v. Flowers*, the Auditor's Office did not do nothing after learning that the certified mail notices sent to Swami's address of record were "undeliverable as addressed." The Auditor's Office searched its own records, as well as the local phonebook, in an attempt to track down an address for Swami. As noted above, under *Jones*, this was above and beyond what was required. *See Jones v. Flowers*, 126 S.Ct. at 1719 ("We do not believe the government was required to go [as] far [as] search[ing] for [the taxpayer's] new address in the . . . phone book and other government records.").

The phone book was a dead-end, since Swami's number was not listed. However, after learning from its own records that Swami owned an adjacent parcel of property, the Auditor's Office sent notice via certified mail to that property as well.[2]

The Auditor's Office also posted notice of the tax sale at a public place of posting, and it published notice of the tax sale once each week for three (3) consecutive weeks in the local newspapers. These notices were far more extensive than the single published notice found insufficient in *Jones*.

In addition, after the tax sale, but well before the expiration of the redemption period, the Auditor's

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[2] Presumably because there was no residence on the adjacent property, this notice was sent back with the notation: "Returned to Sender – No Such Number." (Affidavit of Scot Harber at ¶ 21).

Office conducted a title search on the property and, after learning of a mortgage on the property, sent notices to the mortgagee. The mortgagee received actual notice of the tax sale and, as a consequence, the period of redemption. The Auditor's Office could have reasonably believed that actual notice to the mortgagee would substantially increase the likelihood of actual notice to Swami. *Cf. Jones*, 126 S.Ct. at 1719 (recognizing that notice to persons with even a tenuous relationship to the tax delinquent is likely to increase the chance of actual notice).

In the trial court, Swami argued that the Auditor's Office should have (1) sent the notice by regular mail, (2) posted the notice on the tax sale property, or (3) checked with the Secretary of State to determine Swami's registered agent. In light of the other reasonable steps taken by the Auditor's Office, these options were not required. *Cf. Jones*, 126 S.Ct. at 1718 (*Jones* does not "prescribe the form of service that the [government] should adopt.").

Moreover, sending the notice by regular mail would have made no difference in this case. Swami moved out of the Dell Cove address in July of 1999. The county did not send the first notice of tax sale until July 23, 2002 – some three years after Swami moved. Since the USPS forwards mail for only one year after a change of address form is filed, the regular mail notice would have been returned "Unable to Forward," just like the certified mail notice was. Likewise, there was no front door available on

the Real Estate to post notice of the tax sale, because the land was undeveloped. *Jones* is distinguishable in this regard.

Similarly, the Auditor's Office had no obligation to contact the Secretary of State to determine Swami's agent. As *Jones* acknowledged, the Auditor's Office is not required to search other government records, or even the phonebook, to determine where to send notice. Contacting the Secretary of State is no different.

For all these reasons, the notice provided by the Auditor's Office satisfied due process, and therefore there is no reason for this Court to grant certiorari.

CONCLUSION

This matter was decided on the basis of res judicata, an issue of Indiana law, and therefore there is no basis for granting certiorari. Because the Petitioner raised and then abandoned its due process claim in the underlying litigation, the Indiana Court of Appeals properly held that this claim was barred by res judicata. Even if the Court ignores the res judicata issue, there is no reason to grant certiorari. The notice provided by the Auditor's Office satisfied due process, and Swami has admitted that actual notice would have made no difference in the outcome of the case. For the foregoing reasons, Thelma Retz respectfully requests that this Court deny the

petition for writ of certiorari and order all other just and proper relief.

Respectfully submitted,

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